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See concurring opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH JOHN COVARRUBIAS, Defendant and Appellant.	E069051 (Super.Ct.No. RIF1604466) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge. Affirmed in part; reversed in part.

Suzanne G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph John Covarrubias accompanied his girlfriend Laura Lara to a Rite Aid store in Riverside. Rite Aid's loss prevention officer, Paul Gonzales, observed Lara put several cosmetic items in her bag and leave without paying. When Gonzales confronted Lara outside the store and took her bag, defendant protested and told him to leave Lara alone. Gonzales did not give back her bag. Defendant grabbed a shovel from a nearby shopping cart that contained his belongings. Defendant swung the shovel at Gonzales so close to his head Gonzales heard the wind. Defendant threatened to kill Gonzales. Gonzales was able to get inside the Rite Aid and another employee locked the doors. Defendant bashed in the glass doors with the shovel. Lara entered the store and retrieved her bag. Defendant was convicted of assault with a deadly weapon, making criminal threats, and vandalism exceeding $400.

On appeal, defendant claims (1) instructional error on the assault with a deadly weapon charge requires reversal of his conviction; (2) the prosecutor committed misconduct during closing and rebuttal arguments; (3) the trial court improperly denied his *Romero*[1] motion to strike one of his prior serious and/or violent felony convictions; (4) remand for the trial court to strike his prior serious felony conviction suffered pursuant to section 667, subdivision (a) after Senate Bill 1393 is required; and (5) cumulative error requires reversal of two of his convictions.

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[1] *People v. Superior Court (Romero)* 13 Cal.4th 497.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty in count 1 of assault with a deadly weapon, to wit, a shovel (§ 245, subd. (a)(1)). In count 2, he was found guilty of making criminal threats (§ 422). In count 3, defendant was found guilty of vandalism in an amount exceeding $400 (§ 594, subd. (b)). In addition, the jury found true the special allegation for count 2 that he personally used a deadly and/or dangerous weapon.

In a bifurcated court trial proceeding, after waiving his right to a jury, the trial court found true that defendant had suffered two prior serious and/or violent felony convictions (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)); and two prior serious convictions (§ 667, subd. (a)(1)). Defendant was sentenced to the determinate term of 12 years 4 months, plus the indeterminate term of 25 years to life, to be served in state prison, for a total of 37 years 4 months.

A. FACTUAL HISTORY

1. *PEOPLE'S CASE-IN-CHIEF*

Paul Gonzales was a loss prevention officer (LPO) employed at the Rite Aid on Van Buren in Riverside. He had been working as an LPO for Rite Aid for nine years. On September 6, 2016, Gonzales was walking around the store in plainclothes looking for customers stealing from the store. He observed a woman, later identified as Laura Lara, put seven or eight cosmetic items into her bag. She exited the store without paying for the items and Gonzales confronted her outside the store about the items in her bag. He showed her identification that identified himself as a LPO. He asked her to return to

the store but she refused. Defendant was standing outside by a shopping cart filled with items.

Gonzales told Lara to give the merchandise back and he would let her go. Gonzales had his hand on her bag. Defendant approached him and said, "What the fuck is going on? You better fucking leaving us alone right now." Gonzales told defendant he needed the stolen merchandise back from Lara. Defendant became aggressive. Defendant said to him, "You want to fucking die. I'm going to kill you. Do you know that I'm involved with the Mexican Mafia. I know where you fucking work. I'm going to kill you."

Defendant grabbed a shovel, which was pointed and had a broken handle, from his shopping cart. Lara tried to stop defendant by standing between defendant and Gonzales. Defendant pushed her out of the way. Gonzales retreated back toward the store. Defendant swung the shovel at him two times while Gonzales had his back to him walking into the store. Gonzales stated that it came close to him because he "felt the wind behind [his] head." Defendant hit a nearby pillar with the shovel. Other Rite Aid employees locked the front doors once Gonzales was inside the store. Defendant ran toward the store swinging the shovel. The door shut just as defendant got to the doorway.

Defendant swung the shovel at the windows, breaking the windows. Defendant yelled that he was going to "fucking kill" Gonzales seven or eight times. Gonzales was hit in the face with glass; the store manager was also hit with glass. Gonzales had dropped Lara's bag near the entrance. Lara came inside and retrieved the bag. Once she had the bag, defendant fled on foot pushing the shopping cart.

Gonzales called the police. He reported that he was the LPO and that he tried to stop defendant's girlfriend. Defendant grabbed a shovel and told Gonzales he was going to kill him. Gonzales reported, "he swung towards me with a shovel" and broke out the windows in the store.

Veronica Devine was a supervisor at the Rite Aid. She overheard Gonzales tell Lara, who had been in the store, to return inside the store and give back merchandise. He clearly identified himself as a LPO. She heard defendant start screaming at Gonzales. She then observed defendant grab a shovel and start swinging it. She observed defendant swing towards Gonzales's head before hitting one of the pillars outside the store. Devine also heard defendant threaten to kill Gonzales. Devine called 911. She reported an officer was needed because a man was threatening the LPO with a shovel, swinging it at him. She reported he was breaking all of the glass in the store.

Defendant was apprehended near the store. Gonzales identified defendant at the location and told the responding officers that he feared for his life when defendant swung the shovel at him. The items that were taken from the store were not found in Lara's bag.[2] The shovel was found in the bag carried by Lara. It cost $737.05 to fix the front windows on the Rite Aid.

[2] Gonzales believed, after watching the video surveillance, that Lara had actually secretly put the items in a plastic bag under her purse and was able to give it to defendant to hide during the commotion outside.

Gonzales was scared during the incident because defendant mentioned the Mexican Mafia. He was also afraid defendant was going to hit him in the back of head with the shovel. The pillar outside the store was damaged.

2. *DEFENSE CASE*

Defendant testified on his own behalf. Defendant admitted his prior convictions and denied he was in the Mexican Mafia. He and Lara were homeless at the time of the incident at the Rite Aid and all of their belongings were in a shopping cart. Lara went into the Rite Aid to go to the bathroom. He noticed Gonzales standing outside the store. He was in plainclothes so defendant did not think he worked at the store. Gonzales was a lot taller and heavier than defendant.

When Lara exited the Rite Aid, Gonzales immediately grabbed her bag and sat her on the concrete outside. Defendant did not hear Gonzales say anything to Lara. Gonzales never identified himself as a LPO. Defendant told Gonzales to leave Lara alone because he thought Gonzales was robbing Lara. Defendant grabbed the shovel to use as a "scare tactic." Gonzales backed off and went back in the store. Defendant did not intend to hit Gonzales with the shovel. He denied that he swung the shovel at Gonzales; he just held it up.

Defendant approached the window of the Rite Aid and yelled for Gonzales to give back the purse. Defendant could not into the store to get the purse because the doors were locked. He only hit the window in order to get inside to get Lara's purse back. He may have said he was going to kill Gonzales but it was only because he was upset.

Defendant loved Lara and was trying to protect her. Despite thinking Lara was being robbed, he never called the police.

DISCUSSION

A. ASSAULT WITH A DEADLY WEAPON INSTRUCTIONAL ERROR

Defendant insists, relying upon *People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105, that his conviction of assault with a deadly weapon and the personal use of a deadly weapon enhancement must be reversed due to instructional error. He contends the trial court instructed the jury with a legally incorrect theory when it instructed the jury with CALCRIM Nos. 875 and 3145. Since the jury was presented with a legally incorrect theory, that a shovel is an inherently deadly weapon, reversal is required. The People state that such error was factual, not legal, and that even if there was legal error, it was harmless beyond a reasonable doubt.

1. *INSTRUCTION TO THE JURY*

The jury was instructed that defendant was charged with assault with a deadly weapon and it must conclude whether the evidence presented supported the charge. They were instructed, "To prove the defendant is guilty of this crime, the People must prove that: [¶] The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person. [¶] Second, the defendant did that act willfully. [¶] Third, when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and [¶] Fourth, when the defendant acted, he had the present ability to apply force with a deadly

weapon other than a firearm to a person." The instruction defined willfully, great bodily injury, and touching.

The instruction then defined deadly weapon as follows: "A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." Great bodily injury was defined as "significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." CALCRIM No. 875 also instructed, "No one needs to have actually been injured by the defendant's act." The jury was also given the lesser included instruction on simple assault.

The jury was also instructed on the enhancement for personal use of a deadly and dangerous weapon. They were advised "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that is capable of causing and likely to cause death or great bodily injury."

2. *LEGAL ERROR AND STANDARD OF REVIEW*

A shovel is not an inherently deadly or dangerous weapon. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1027-1028, superseded by statute on another ground as stated in *People v. Perez* (2018) 4 Cal.5th 1055, 1061, 1068 [few objects, such as dirks and blackjacks, are deadly weapons as a matter of law].) As such, the portions of CALCRIM No. 875 and CALCRIM No. 3145, which advised the jurors that defendant had to do an act with a deadly weapon, and that deadly weapon, here the shovel, was defined as any object, instrument, or weapon that is inherently deadly, was erroneous.

The inclusion of the instruction that the shovel was an inherently deadly weapon was legal error. (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318.) In *People v. Merritt* (2017) 2 Cal.5th 819, the California Supreme Court concluded that the failure to instruct on the elements of a crime is subject to harmless error analysis, e.g. determining "whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Id.* at pp. 829, 831.) This is the traditional *Chapman v. California* (1967) 386 U.S. 18 beyond-a-reasonable-doubt standard. Prior to *Merritt*, in *People v. Chun* (2009) 45 Cal.4th 1172, the court expressed in a case involving instruction with a legally invalid theory that "to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory." (*Id.* at p. 1203.)[3] We review the entire record to determine whether it demonstrates beyond a reasonable doubt that the error did not change the outcome of the case. (*Merritt*, at pp. 831-832; *Stutelberg*, at p. 321 ["we choose to follow the traditional *Chapman* standard, which allows us to affirm where a review of the entire record demonstrates beyond a reasonable doubt that the error did not change the outcome"].)

3. *PREJUDICE IN THIS CASE*

Here, the jury was presented with a legally valid theory (the shovel could be considered a deadly weapon because it was used in a manner that was capable of causing and likely to cause great bodily injury) and an invalid legal theory (the shovel was an

[3] In *People v. Aledamat*, *supra*, 20 Cal.App.5th at p. 1153, the appellate court applied the standard that the reviewing court must find the jury *actually relied* upon the valid legal theory for the error to be found harmless. The California Supreme Court has granted review in *Aledamat*.

inherently deadly weapon). A review of the entire record demonstrates "beyond a reasonable doubt that the error did not change the outcome." (*People v. Stutelberg*, *supra*, 29 Cal.App.5th at p. 321.)

Based on the testimony of Gonzales, defendant swung the shovel at his head several times so close that Gonzales could hear the wind. Devine also observed defendant swing the shovel close to Gonzales's head. Defendant threatened to kill Gonzales just prior to swinging the shovel at his head. The video surveillance depicted that the shovel was pointed and had only a portion of the handle. Defendant used that same shovel to violently smash in the glass doors. The manner in which defendant used the shovel clearly was likely to have caused great bodily injury.

Further, the prosecutor argued to the jury as follows: "First of all, what is a deadly weapon? Before I talk about that first element [did defendant commit an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person], I want to define what a deadly weapon is. Law tells us it's something that is inherently deadly, and that it's any object or instrument that is used in a way that is capable of causing death or great bodily injury. [¶] I wrote in there, bat, pen, flashlight. Those are things you can turn into a deadly weapon. What do I mean by that? The example I used in voir dire, if I use this pen in . . . a stabbing motion, I turned it in to a weapon. If you use a bat used in baseball, softball, you hit someone over the head, what could you do? You could cause a lot of harm including bodily death. The law tells us that that's what you do if you use an ordinary instrument in a way that can make in to a weapon." [¶] Can a shovel, something that is used to dig up dirt, be used as a weapon?

Absolutely. The moment the defendant holds up the shovel against someone's head in a way that he could cause harm, that he has just turned that innocent shovel into a deadly weapon." The prosecutor never argued to the jury that the shovel was an inherently dangerous weapon. The only argument to the jury was that the shovel was used in a manner likely to cause great bodily injury.

Defendant never disputed that the shovel was being used as a deadly weapon. Rather, he insisted it was just held by him to scare Gonzales and that he acted in self-defense. However, the evidence of self-defense was weak as Gonzales clearly identified himself as an LPO and was retreating back into the store when defendant swung the shovel at his head. There was no justification for swinging the shovel near Gonzales's head.

Defendant relies on the video in which he insists there is no showing that he swung the shovel close to Gonzales's head. However, the video does not clearly show the events that occurred outside. The jury could reasonably believe Gonzales and Devine that the shovel came so close to his head that Gonzales heard the wind. Defendant also argues hitting the glass with the shovel would not have likely caused great bodily injury or death. However, based on the video, he violently hit the window. Glass could have caused great bodily injury.

Based on the foregoing, the instructional error was harmless beyond a reasonable doubt as the evidence overwhelmingly established defendant used the shovel in a manner likely to cause great bodily injury.

B. PROSECUTORIAL MISCONDUCT

Defendant insists the prosecutor, in closing and rebuttal argument, committed misconduct by appealing to the sympathy of the jury, misstating the law on assault with a deadly weapon and disparaging defense counsel. He admits that defense counsel did not object to any of the instances of misconduct. He argues that if he waived the prosecutorial misconduct claims, he received ineffective assistance of counsel.

Defendant refers to three occasions that the prosecutor committed misconduct. First, during opening argument, the prosecutor referred to the fact that society recognized the dangers associated with being a police officer. The prosecutor stated that he did not intend "to compare in any way, shape or form the dangers that officers see on the streets to that of a loss prevention officer, but for a moment I want you to consider what a loss prevention officer deals with every day of their life. When they're working, what it's like for them to be in a store, to be dealing with shoplifters, and what it is they have to go through and think in the back of their mind every time they have to go up to a shoplifter." The prosecutor continued that sometimes when dealing with a shoplifter, if he or she was a "normal person" the interaction was "okay." However, it was different when the interaction resulted in fear of injury. The prosecutor noted, "So it's difficult to be in a position where you have to assess the dangers, and you have to act. But these people, at the end of the day, do their job because they have to feed their families as well."

The prosecutor continued, "It's unfortunate that we get from in here, and in a very sterile environment when the dangers are gone and we can sit down and pick apart everything they've done, and make them look like liars, not believe them, and scrutinize

everything they have to say. But let's not forget to be them. Let's not forget what it's like to be in that situation when somebody is threatening your life, when somebody is threatening you with harm. And they still have to act professional. They have to act tough. And they have to do their job in the right way." The prosecutor concluded, "So when we're scrutinizing his testimony, let's not forget what he was faced with that day." There was no objection.

The second instance of misconduct claimed by defendant involved argument regarding the crime of assault with a deadly weapon. The prosecutor argued, as outlined *ante*, that a shovel could be used as a weapon. The prosecutor clarified that no one had to be injured. The prosecutor additionally stated, "So did the defendant use a shovel in a way that *could* have caused serious injuries or death? . . . [¶] So he turned the shovel into an assault weapon. And what you have to think about for this element is: Did he use it in any way that *could* have cause injuries? Absolutely. What could have happened if the shovel made contact? What could have happened if that glass, although it flew on Mr. Gonzales's face, what could have happened? And the law tells you to consider what could have happened, not what actually happened, but what could have happened." (Italics added.)

The prosecutor further argued, "[t]he moment someone is swinging with a shovel, what injuries could result from that? And that applies, and that's enough. So what if the glass flew into the LPO actually cut him? What if the glass went in his eye? What if the glass cut his vein? What if he actually did make contact with the shovel and the assistant manager wasn't able to close the door on time? What if he actually made contact by the

pillars? You have to consider all those things. And that is enough. [¶] And if you think he used the shovel in a way that could have caused an injury, then this element has been met." There was no objection by defense counsel.

The third instance was in rebuttal argument. Defense counsel had argued during closing, "You know, the jury instructions, they're not only complicated and confusing, it's tough to use them to get to justice in this case, because what [defendant] was doing was to try to stop what he thought was a robbery. And we all know that you can take action to do that." Also noted there was nothing in the law allowing for self-defense to making criminal threats. In response, the prosecutor argued, "Something important that [defense counsel] said—and I need you guys to pay attention to this. With the vandalism, look at the law. With the other two, forget the law. He doesn't want you to follow the law. I don't know what to think of that. The law is confusing. Don't think of the law. Don't follow the law. Think of what a person in his position would have done. You took an oath to follow the law. You have the law. I have never heard an attorney tell a jury not to follow the law. That is what the defense attorney is telling you to do because he knows the law is against the facts in this case. He knows if you follow the law, his client is very guilty of it."

The prosecutor further argued that defense counsel wanted to distract the jury from the fact that defendant was lying. The prosecutor further stated, "He wants you to disregard the fact the defendant is lying and painting me as a person who, I don't know, is conspiring to get an innocent man into trouble, as if a prosecutor's jobs is to make innocent people into criminals. I don't like talking about this. There is a difference

between what defendant attorneys do and there's a difference what prosecutors do. And the defense's job is to protect his client in a criminal proceeding no matter what. [¶] Prosecutor's job is not to put innocent people and make them into criminals. That is not what we do. That is not my job, and that was something insinuated, and it's very offensive."

Defendant concedes that he did not object to the instances of misconduct. "[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Despite defendant's argument to the contrary, even if the comments by the prosecutor were improper, all of the instances could have been cured through an admonition to the jury by referring the jury to the instructions and instructing the jury to ignore the comments of counsel. As such, defendant waived his claims of prosecutorial misconduct.

Anticipating that this court would consider the claims of prosecutorial misconduct waived, he contends that he received ineffective assistance of counsel due to his counsel's failure to object.

In order to prevail on a claim that defense counsel rendered ineffective assistance, defendant must show both that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Hernandez* (2012) 53

Cal.4th 1095, 1105.) " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

The failure to object to the argument by the prosecutor in this case was a reasonable tactical decision. As counsel was presumably well-aware, " 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) The reviewing court does not look to isolated words or phrases, but rather "must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

First, as to the argument regarding Gonzales's job as a LPO, there was a reasonable tactical reason not to object. Inviting the jury to " 'view the case through the victim's eyes' " is an improper appeal to the passion and prejudice of the jurors. (*People v. Lopez* (2008) 42 Cal.4th 960, 969.) Here, the prosecutor did not emphasize that the jury should view the case through Gonzales's eyes, thereby seeking to appeal to the passion and prejudice of the jurors, but rather explained to the jury the difficulty in being

a LPO. Defense counsel could reasonably conclude that this argument fit within the wide latitude of argument and an objection would be futile.

Second, as for using the term "could" rather than "likely" in arguing regarding whether the evidence showed assault with a deadly weapon, there was a reasonable tactical reason to not object. It is misconduct for a prosecutor to misstate the law during argument. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) However, defense counsel could have reasonably concluded that the difference between "could" and "likely" was not significant. Moreover, defense counsel focused the argument on self-defense and, by asking the jury to ignore the instructions, made a choice not to argue the instructions. Defense counsel may not have wanted to emphasize the wording of the instructions by objecting to the prosecutor's comments.

Finally, the prosecutor's comments in rebuttal argument regarding defense counsel were in response to the argument that the jury should ignore the instructions. "'[R]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel. [Citations.] [E]ven otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, does not constitute misconduct.' " (*People v. Reyes* (2106) 246 Cal.App.4th 62, 74.) Here, defense counsel had stated in argument that the instructions were confusing and that justice could not be done in the case by following the instructions. In response, the prosecutor addressed the issue, advising the jurors it was unusual for defense counsel to make such a request. Further, the prosecutor commented that defense counsel "insinuated" that an innocent man was being prosecuted, which was proper rebuttal argument.

Even if defense counsel had no reasonable tactical reason to fail to object to the prosecutor's arguments during closing and rebuttal, defendant has failed to establish a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to him. (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694; *People v. Hernandez, supra,* 53 Cal.4th at p. 1105.)

Here, both Gonzales and Devine testified that Gonzales identified himself as a LPO and requested return of the items taken by Lara. Rather than comply, defendant immediately became aggressive. Defendant swung the shovel at Gonzales's head several times so close that Gonzales could hear the wind. Defendant threatened to kill Gonzales just prior to swinging the shovel at his head. The manner in which defendant used the shovel clearly was likely to have caused great bodily injury; he caused damage to the Rite Aid exceeding $400; and Gonzales was scared that defendant was going to hurt him because defendant threatened to kill him. The evidence overwhelmingly supported defendant's convictions and any comments by the prosecutor were not prejudicial.

C. *ROMERO* MOTION

Defendant contends the trial court erred by denying his motion to strike one of his strike convictions by relying on the wrong standard in ruling on the motion.

1. *MOTION AND RULING*

Prior to sentencing, defendant's counsel filed a *Romero* motion to strike one of his prior serious or violent felony convictions. The two prior strikes—both first degree burglary—were suffered in 1989 and 1990. Defendant argued all of the priors were remote and the intervening crimes were lesser, non-violent crimes. Further, defendant's

counsel argued that defendant suffered from a substance abuse problem. The People filed opposition. They argued that the defendant had an extensive criminal history and had never been successful in staying out of prison or jail since 1986.

At the time of sentencing, defense counsel argued the *Romero* motion. Defense counsel emphasized that defendant had a long history of methamphetamine abuse. He had a difficult childhood. His parents divorced when he was 15 years old and he lived in a bad neighborhood. He started abusing drugs. He got the two strike convictions when he was in his early twenties and he was now 50. The strikes were remote. He had only committed minor offenses since those crimes. He committed additional crimes because he could not find work or a home. No one was hurt during the instant offense; the LPO was just scared. Moreover, based on defendant's age, the three strikes sentence would essentially be a life sentence.

The trial court indicated it was considering the request based on the age of the priors and the fact there were no interim serious or violent felonies. The prosecutor argued that there was no time in defendant's life in which he was free from custody or out of trouble. Further, the current crime involved the violent use of a shovel. He committed this most dangerous act at a mature age.

The trial court asked defense counsel to respond because "I would give strong consideration to striking one or both of the strikes due to their age and [defendant]'s lack of maturity at the time. [¶] But what findings do you think I would be able to make that would stand up in the event of an appeal in this matter?" Defense counsel responded regarding the minor crimes committed in the interim and his drug use. The People

responded that in 1995 defendant was sentenced to nine years in prison and in 2011 for seven years. There was not a "washout" period.

The trial court first noted, "I'm very much on the fence in this request. Because despite the severity and seriousness of the instant offense, I don't believe that it is a crime that standing alone would be deserving of a life commitment." The court noted there was no intent to kill. It then stated, "So the question of the remoteness of the two strikes in this matter makes it difficult for the Court given that there is an intervening series of less serious offenses committed by the defendant over the course of time since 1990." The court noted it appeared the interim offenses were motivated by intoxicating substances "[a]nd I would agree more likely than not that usually was methamphetamine. But I also agree with the People that the defendant's had plenty of opportunities to try to clean up and has not taken advantage of it."

The trial court concluded, "So there's many conflicting considerations that go back and forth with respect to the invitation for the Court to exercise its discretion. But for the intervening convictions, including but not limited to the two felony convictions resulting in a state prison commitment, one of which at least would, as pointed by [defense counsel], certainly be a misdemeanor violation today. [¶] It's very difficult for the Court. But I don't believe that I am in a position to make findings that would hold up on appeal in this matter, despite the age and remoteness of the previous convictions strike priors. [¶] So the invitation to strike the two strike priors is denied."

2. *ANALYSIS*

A trial court has discretion to dismiss a strike prior under section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) The trial court considers " 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Carmony*, *supra*, 33 Cal.4th at p. 375.) "This standard is deferential. [Citations.] [I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony*, *supra*, 33 Cal.4th at p. 378.) Defendant must show that the trial court's decision not to strike the prior conviction is irrational or arbitrary. (*Id.* at p. 376.)

Defendant has failed to show the trial court's decision was based on an improper standard. The trial court considered the different factors including defendant's background and prospects. Although the trial court commented that if it were to strike one of the priors the decision would be reversed on appeal, viewed in context, it was based on the trial court's careful consideration of defendant's record, and not merely on the trial court's view that it wanted to strike the prior but did not want to be reversed on appeal.

The trial court did not abuse its discretion. Defendant committed several drug and theft offenses between 1986 and 1989. He then committed the two first degree burglary offenses in 1989 and 1990, which constituted the two strikes in this case. In 1990, he was sentenced to state prison for four years. Beginning in May 1993, he committed numerous theft and drug offenses. In 1995, he received a nine-year state prison sentence. He was paroled on March 31, 2002. He almost immediately went back into custody and violated parole several times between May 2002 and November 2003. In January 2004, he committed another drug offense and was sentenced to 72 months in state prison. He got out of prison in December 2009 but violated his parole numerous times between 2009 and November 2010. Between March 2011 and November 2014, he committed 12 additional theft and drug offenses. He was placed on probation or placed in jail and violated his probation numerous times.

Nothing deterred defendant's continual commission of crimes and there was nothing to support that given a lesser sentence, he would no longer commit any offenses. Further, the offense here was violent posing a risk to not only Gonzales but all of the

employees and patrons of the Rite Aid. The trial court did not abuse its discretion by declining to strike one of defendant's prior strike convictions.

D. SENATE BILL 1393

Defendant argues in his supplemental briefing that he is entitled to remand for resentencing pursuant to Senate Bill 1393 (S.B. 1393), which amended sections 667, subdivision (a) and 1385, to allow a trial court to strike enhancements for prior serious felony convictions. Defendant's sentence included five-year terms for each of his prior serious felony convictions. The People concede defendant is entitled to remand for resentencing.

Effective January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b), allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Under the prior version of section 667, subdivision (a), the court was required to impose a five-year consecutive term for prior serious felony convictions and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*Garcia*, at p. 971.) The People concede, and we agree, that the amendment applies to defendant as his case is not final. (*Id*. at pp. 972-973 [S.B. 1393 applies retroactively to all cases not yet final on the effective date].) Accordingly, we vacate defendant's sentence and remand this matter to allow the trial court to exercise its discretion to strike or impose the prior serious felony enhancements.

E. CUMULATIVE ERROR

Defendant contends the cumulative effect of the alleged errors based on the erroneous instruction to the jury on the assault with a deadly weapon and personal use of a weapon charges, and the prosecutorial misconduct, denied him of a fair trial under the Fourteenth Amendment. "In examining a claim of cumulative error, the critical question is whether [the] defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068.) We have found that defendant waived his claims of prosecutorial misconduct and that there was no ineffective assistance of counsel. Hence, there was no cumulative effect of multiple errors, the only situation in which the cumulative error doctrine applies. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *Sedillo*, at p. 1068.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to exercise its discretion with respect to S.B. 1393.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

I concur:

McKINSTER
Acting P. J.

[*People v. Covarrubias* — E069051]

RAPHAEL, J., Concurring.

I join the result of the opinion and agree with nearly all of its analysis. I write to address the applicable standard of review.

Our Supreme Court has articulated a standard when it has analyzed whether error was harmless where, as here, a jury has been instructed on two legal theories, one valid and one not. In such a circumstance, the instruction on the invalid legal theory may be harmless when "'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary'" to convict the defendant under the valid legal theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226 [quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1205].)

That standard has us review the trial proceedings to determine if we have a reasonable doubt about what the jury actually did. I disagree with the opinion's application of a different standard, from *People v. Merritt* (2017) 2 Cal.5th 819, 831, that has us consider what a hypothetical "rational jury" would have done absent an error. (Maj. opn., *ante*, at p. 8.) Unlike the instructional error this case, *Merritt* involved an element missing from the jury instructions. With a missing element, it is necessary for a reviewing court to consider what a hypothetical rational jury would have done, because (unlike here) the actual jury was not provided with a correct legal theory.

The distinction between focusing on a hypothetical "rational jury" and on the actual jury does not matter to the result here. But we should apply the standard that our Supreme Court has articulated for the particular type of error, unless and until it applies a

different standard. (See Maj. opn., *ante*, at 9 fn. 3 [noting the Court has granted review in *People v. Aledamat* (2018) 20 Cal.App.5th 1149].)

RAPHAEL
J.